Supreme Court, U.S.
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No. 94-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

STATE OF NEW JERSEY,

Petitioner,

v.

EDDIE SAEZ, ORLANDO NAVARRO AND LUIS SAEZ,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

PETITION FOR WRIT OF CERTIORARI

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70 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether a private search into ongoing criminal activity initiated by a concerned citizen routinely mutates into unconstitutional governmental action under the Fourth Amendment whenever the police are invited by the third party to view from the same vantage point what he or she observed?

2. Whether the third party intervention doctrine as set forth by this Court in *United States v. Jacobsen*, 466 U.S. 109 (1984), and *Walter v. United States*, 447 U.S. 649 (1980), allowing the police to conduct warrantless searches of tangible, immutable contraband in the possession of a third party, should be extended to instances when the private party invites the police to view ongoing criminal activity?

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1994

No. _____

STATE OF NEW JERSEY,

Petitioner,

vs.

EDDIE SAEZ, ORLANDO NAVARRO and LUIS SAEZ,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

The petitioner, State of New Jersey, respectfully prays that a writ of *certiorari* issue to review the judgment and opinion of the Supreme Court of New Jersey entered in the above-entitled proceeding on February 23, 1995.

OPINIONS BELOW

The opinion of the Superior Court of New Jersey, Appellate Division, is reported at 268 N.J. Super. 250, 633 A.2d 551 (App. Div. 1993), and is reprinted as Appendix B, p. 6a-44a, *infra*.

The opinion of the Supreme Court of New Jersey is reported at 139 N.J. 279, 653 A.2d 1130 (1995), and is reprinted as Appendix A, p. 1a-5a, *infra*.

JURISDICTION

The jurisdiction of this Court to review the judgment of the Supreme Court of New Jersey, dated February 23, 1995, is invoked under 28 U.S.C. sec. 1257(a). The portion of the opinion of the Supreme Court of New Jersey to which *certiorari* is sought does not give a "plain statement" of the existence of independent and adequate state grounds upon which the decision rests. See *Arizona v. Evans*, __ U.S. __, __, 115 S.Ct. 1185, 1189-90 (1995); *Illinois v. Rodriguez*, 497 U.S. 177, 182 (1990); *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983). Instead, the state supreme court opinion expressly identifies and relies upon that portion of the dissenting opinion of the Superior Court of New Jersey, Appellate Division, which invokes only the Fourth Amendment to the United States Constitution and federal case law to hold that the warrantless search of respondents' premises was not justified by the third party intervention doctrine. (App. A, at p. 2a-3a; App. B, at pp. 33a-35a). *Cf. Ylst v. Nunnemaker*, 501 U.S. 797, 804 (1991) (in federal *habeas corpus* actions, there is a rebuttable presumption that an unexplained order of a state court leaving in effect the decision of a lower court "looks through" to the last reasoned decision in agreement with the order).

The remainder of the state appellate court's dissenting opinion utilizing Fourth Amendment cases as guidance in determining whether the search was reasonable under Article I, paragraph 7 of the New Jersey Constitution speaks to possible exceptions to the warrant requirement as alternatives to the third party intervention doctrine, such as the open view doctrine and the plain view exception to the exclusionary rule. (App. B, at pp. 35a-44a). The Supreme Court of New Jersey specifically

declined to address alternative theories for validating the warrantless search (App. A, at p. 3a) and petitioner does not raise these as grounds for *certiorari* before this Court.

FEDERAL CONSTITUTIONAL PROVISION INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

The undisputed facts developed at the suppression hearing conducted before the state trial court, and set forth comprehensively in the opinion of the Superior Court of New Jersey, Appellate Division, Appendix B, at pp. 11a-15a, are as follows: on May 15, 1990, Investigator Michael Cassidy of the Narcotics Strike Force Unit of the Monmouth County Prosecutor's Office met with an unnamed "citizen informant" at a service area on the Garden State Parkway. The woman told Investigator Cassidy that, looking through cracks in the party wall dividing her basement from the basement of her next-door neighbor, respondent Eddie Saez, she had observed Eddie Saez and another Hispanic male on several different dates, usually around dinner time, cutting, weighing and packaging large

quantities of drugs. The informant saw the men mix together two white powdery substances and put them into individual bags. The woman had given reliable information to the police in the past regarding undercover narcotics investigations which had resulted in arrests. The decision was made to set up an undercover investigation of Eddie Saez's property.

Two days later, on May 17, 1990, at 5:40 p.m., Cassidy entered the basement of the informant's apartment at 111A Fifth Avenue in Asbury Park, New Jersey, with the informant's permission. The building itself was a two-family, side-by-side ranch residence. A poorly constructed partition erected out of thin wood planks separated the two basements.[1] From inside the informant's apartment, Cassidy had a clear and unobstructed view of the majority of Eddie Saez's basement through spaces in the partition: there were two small circular holes in the wall four to five feet from the floor and a wider crack between two slats which Cassidy could look through while crouching. The investigator did nothing to create the gaps and holes in the wall or to make them more accessible.[2]

Within Eddie Saez's amply lit basement, Cassidy saw Eddie Saez, respondent Luis Saez and a third unidentified Hispanic male in the process of "rerocking" cocaine for distribution, that is, adding filler to the cocaine, spooning the mixture into a cylinder with a small amount of water and then

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[1] The basement windows on Eddie Saez's side of the premises had been painted over and covered with cloth material.

[2] As the majority opinion of the appellate division notes, "[t]he holes and gaps through which the observations were made were confirmed by photographs introduced at the suppression hearing." (App. B, at p. 12a n.5).

compressing it until it became rock-like. The unidentified Hispanic male would then break up the rock cocaine and put the pieces into small, clear plastic bags.

About thirty minutes into his observations, Cassidy looked through the informant's basement window and saw respondent Orlando Navarro drive up in a black Toyota. Navarro entered Eddie Saez's basement and assisted with the packaging of the cocaine. Twenty-five minutes later the men completed the "rerocking" procedure. Cassidy sent a radio transmission to back-up investigators stationed in unmarked vehicles near Eddie Saez's apartment that the unidentified Hispanic male was leaving the premises, but the back-up team could not locate him.

Carrying an aerosol can and a box of aluminum foil, Luis Saez left the apartment with Navarro and drove away in the black Toyota. Cassidy relayed this information to his back-up team and the car soon was stopped by police. Luis Saez bolted from the passenger side of the car. An officer gave chase until Luis Saez stopped and made a movement toward his shirt pocket. Concerned for his own safety, the officer grabbed Luis Saez's hand; inside was a tin foil packet of cocaine.

The car was impounded and an inventory search turned up the aerosol can and box of foil Cassidy had seen Luis Saez take out of the basement. The can had a false bottom; inside was rock cocaine and bags of heroin.

Over the course of the next two weeks, and with the informant's consent, Cassidy continued his watch of Eddie Saez's basement from the adjacent basement through the

openings in the makeshift partition but did not observe further illegal activity. A search warrant was executed on June 3, 1990, leading to Eddie Saez's arrest.

Respondents' motion to suppress the evidence was denied by the Superior Court of New Jersey, Law Division. The trial court held that the police officer's observation of respondents' drug packaging operation through holes in the party wall separating Eddie Saez's basement from his neighbor's basement without physical intrusion did not constitute a search within the meaning of the Fourth Amendment to the United States Constitution. (Transcript of January 10, 1991, at T27-13 to 33-6). The trial court noted that the police officer lawfully stood in the informant's basement where he employed his "natural senses" to look into the adjacent premises. (Id. at T28-16 to 29-5). Following a jury trial, respondents were found guilty of various narcotics-related offenses.

Denial of the suppression motion was upheld by a majority of the Superior Court of New Jersey, Appellate Division, but on other grounds: the majority found that under either the Fourth Amendment to the United States Constitution or Article 1, paragraph 7 of the New Jersey Constitution, respondents had a legitimate expectation of privacy within the confines of Eddie Saez's home because they had taken precautions to shield their activities from public view by covering up the basement windows and, so, the police officer's observation of the basement through the gaps in the party wall was a search. (App. B, at pp. 15a-18a). No warrant was required to conduct this search, however, because the initial invasion of respondents' privacy was occasioned by the private action of the citizen informant. Relying on this Court's

discussion of the third party intervention doctrine in *United States v. Jacobsen*, 466 U.S. 109 (1984), the majority of the Appellate Division panel concluded "that the police conduct under these circumstances was not an unreasonable search in violation of either the State or federal constitutions" and affirmed the trial court's denial of respondents' motion to suppress the physical evidence. (App.B. at p. 18a-22a). The court rejected respondents' additional grounds for appeal and affirmed the convictions as to all respondents. (Id. at p. 22a-29a).

The dissenting member of the panel agreed that a Fourth Amendment search had been conducted by the investigator but found no justification to uphold the warrantless search. First, the dissent concluded that the search did not fall within the third party intervention doctrine. Relying on *Walter v. United States*, 447 U.S. 649 (1980), the dissent found that the officer's observation of respondents' basement exceeded the scope of the private search and violated respondents' Fourth Amendment right against unreasonable searches:

> In the present case, the police were not invited to view specific, immutable objects that the tenant-informant had reduced to possession. The police were invited to participate in the surveillance of a basement and any activities which might occur in that basement during the police surveillance. Because no one could predict with certainty what the police would see, unlike the Jacobsen line of cases, each moment of surveillance was a new invasion of privacy. The basement activities to be seen from the

> tenant-informant's vantage point could have included licit as well as illicit behavior, activities of other members of the suspect's family and even private intimate behavior.

(App. B, at pp. 31a-35a). Second, the dissent rejected the argument that any other exception to the warrant requirement under the federal or state constitutions, including the open view and plain view exceptions, would permit, in his words, the "egregious breach of privacy" caused by the police surveillance. (*Id.* at pp. 35a-43a). The dissenting judge would have suppressed the fruits of the search, *i.e.*, testimony recounting the activities in the basement observed by the police, as well as the aerosol can and its contents and the tin foil package found in respondent Luis Saez's hand when the officers stopped the Toyota. (*Id.* at p. 43a-44a).

Respondents appealed as of right to the Supreme Court of New Jersey on the basis of the dissent in the appellate division, *N.J. Court Rules, 1969, R.* 2:2-1(a)(2). The state supreme court, in a cursory *per curiam* opinion, reversed the judgment of the appellate division "substantially for the reasons set forth in [the] dissenting [judge's] opinion," (App. A., at p. 2a), with the added notation:

> Although we do not imply that the third party intervention exception applies only when the informant previously has reduced to possession the objects viewed by law-enforcement officials, we are generally in accord with the dissenting opinion's analysis that described the extended and continous police surveillance as a significant

> expansion of the informant's prior observation of the activities conducted in the adjacent basement. [*State v. Saez*, 268 N.J. Super.] at 272-73.

(*Id.* at pp. 2a-3a). The justices declined to consider whether the search was otherwise justified by the plain view exception to the exclusionary rule. (*Id.* at p. 3a). The matter was remanded to the Superior Court of New Jersey, Law Division, for retrial. (*Id.* at p. 3a).

REASON FOR GRANTING THE WRIT

The State Courts' Refusal To Extend The Third Party Intervention Doctrine Of *United States v. Jacobsen* And *Walter v. United States* To Searches Involving Ongoing Criminal Activity Conflicts With Decisions Of This Court On A Substantial Matter Of Federal Constitutional Law.

In a decision that conflicts with federal constitutional principles established by this Court, the Supreme Court of New Jersey has decided a novel and important question of Fourth Amendment law which has not been, but should be, settled by this Court: does a private search into ongoing criminal activity initiated by a concerned citizen routinely mutate into impermissible governmental action under the Fourth Amendment whenever the police are invited by the third party to view what he or she is seeing? The New Jersey state courts misconstrued this Court's opinions in *United States v. Jacobsen*, 466 U.S. 109 (1984), and *Walter v. United States*, 447 U.S. 649 (1980), in limiting the third party intervention doctrine to

instances where the private party and, subsequently, the police officer, view tangible, immutable contraband, and in refusing to extend the doctrine to instances where the private party and, subsequently, the police officer, view ongoing criminal activity such as packaging cocaine for sale on the street or making bombs.

This Court has never considered this substantial issue of the applicability of the third party intervention doctrine to ongoing criminal activity. In *United States v. Jacobsen*, decided four years after *Walter v. United States*, this Court revisited the criterion used to pinpoint when a permissible private search has been transformed into unconstitutional governmental action, but the standard articulated addresses only those instances where the third party intercepts tangible contraband. This petition for *certiorari* provides this Court with the opportunity to extend the concept of the third party intervention doctrine to ongoing criminal activity and to articulate those circumstances, if any, in which federal and state law enforcement officials must secure a search warrant when a private party invites the police onto his property to see what that party is observing.

A. The Federal Third Party Intervention Doctrine Focuses On The Nature Of The Officer's Conduct And Not The Character Of The Object Of The Search And Thus Applies To Ongoing Criminal Activity Initially Viewed By A Private Party.

A search within the meaning of the Fourth Amendment of the United States Constitution "occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." *United States v. Jacobsen*, 466 U.S. at 113. This

Court long has recognized that the search and seizure clause of the federal constitution is "wholly inapplicable" to non-governmental action. *United States v. Jacobsen*, 466 U.S. at 113; *see also United States v. Janis*, 428 U.S. 433, 455 n.31 (1976); *Coolidge v. New Hampshire*, 403 U.S. 443, 489-90 (1971); *Burdeau v. McDowell*, 256 U.S. 465 (1921). When the next-door neighbor stood in her apartment and looked through the gaps in the party wall to observe respondents' cocaine packaging operation, she did so as a concerned private citizen; never have respondents contended that the neighbor was acting as an agent or instrument of law enforcement.[3] (App. B, at p. 21a). Her inspection of the adjoining residence, whether accidental or deliberate, whether fueled by curiosity or suspicion, and whether reasonable or unreasonable, did not violate the Fourth Amendment. *United States v. Jacobsen*, 466 U.S. at 115; *accord, United States v. Moore*, 943 F.2d 884, 887 (8th Cir. 1991); *cf. Colorado v. Connelly*, 479 U.S. 157, 166 (1986) ("The most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause.").

Once the next-door neighbor completed her private search, subsequent involvement of law enforcement did not automatically convert the original intrusion into an

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[3] Respondents Orlando Navarro and Luis Saez conceded before the state supreme court that "the tenant-informant's acts of spying on her neighbor for the two months previous to the ensuing police surveillance on May 17, 1990, constituted a private action not subject to Fourth Amendment safeguards." Brief on Behalf of Defendant-Appellant Orlando Navarro to the Supreme Court of New Jersey at 25. By order filed May 25, 1994, the Supreme Court of New Jersey granted respondent Luis Saez's motion for leave to rely on the brief filed by Orlando Navarro.

unconstitutional governmental search for Fourth Amendment purposes. *Lustig v. United States*, 338 U.S. 74, 78-79 (1949); *United States v. Knoll*, 16 F.3d 1313, 1320 (2d Cir.), *cert. denied*, __ U.S. __, 115 S.Ct. 574 (1994). Any additional "invasions" of respondents' privacy by law enforcement officials "must be tested by the degree to which they exceeded the scope of the private search." *United States v. Jacobsen*, 466 U.S. at 115. The dissenting member of the Superior Court of New Jersey, Appellate Division, and the Supreme Court of New Jersey found a violation of the Fourth Amendment only by misconstruing the plurality opinion of this Court in *Walter v. United States* and focusing on the character of the object of the search, rather than the nature of the officer's conduct, to conclude that Cassidy's actions far exceeded the scope of the citizen's search.

In *Walter v. United States*, a private party, L'Eggs Products, Inc., received a misdirected shipment of cartons containing films explicitly labeled as pornographic. An employee opened one or two of the boxes and held portions of the films up to the light, but the scenes depicted in each frame were so minute that mere inspection with the naked eye proved unsuccessful. The Federal Bureau of Investigation was notified, and agents screened the films with a projector without first making any effort to obtain a warrant. This Court's plurality opinion found that the government's subsequent search significantly exceeded the scope of the private search because "[p]rior to the Government screening one could only draw inferences about what was on the films." *Walter v. United States*, 447 U.S. at 657; *accord, Stanley v. Georgia*, 394 U.S. 557, 571 (1969) (Stewart, J., concurring).

In stark comparison to the eight millimeter-wide reels of pornographic film in *Walter v. United States*, the criminal activity of cutting, weighing and packaging drugs taking place inside Eddie Saez's basement was readily discernible to the naked eye.[4] The informant told Investigator Cassidy precisely what he would see from inside her apartment, and from that vantage point Cassidy saw exactly that. Investigator Cassidy did absolutely nothing beyond that done by the third party: he did not enlarge the holes in the partition; he did not use any device to make otherwise unobservable activities in respondents' basement visible; he did not physically enter respondents' basement; and he did not remove or examine any contraband.[5] Cassidy's passive presence in the informant's basement to confirm the presence of contraband on the other side of the dividing wall did not transform the private search into a public search. *Illinois v. Andreas*, 463 U.S. 765, 769 n.2 (1983); *United States v. Clutter*, 914 F.2d 775, 779 (6th Cir. 1990), *cert. denied*, 499 U.S. 947 (1991). "Once the [officer] came upon the scene, [he was] not required to avert [his] eyes or to

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[4] The pornographic films seized in *Walter v. United States* were also "arguably protected by the First Amendment, and when the basis for the seizure is disapproval of the message contained therein, it is especially important that [the warrant] requirement be scrupulously observed." *Id.* at 655 (footnote omitted). Respondents' cocaine packaging operation, of course, has no added layer of First Amendment protection.

[5] *Compare State v. Rode*, 456 N.W.2d 769 (N.D. 1990) (private carrier intercepted package of cocaine; test later conducted on the substance by police away from location of seizure did not significantly expand scope of private search so as to compromise any privacy interests) *with United States v. Donnes*, 947 F.2d 1430 (10th Cir. 1991) (third party turned over to police a glove containing a syringe and a camera lens case which the third party did not open; officer's warrantless search of camera lens case exceeded the scope of the private search).

ignore what was before" him. *United States v. Jenkins*, 46 F.3d 447, 457 (5th Cir. 1995).

Consequently, that the informant witnessed and described ongoing criminal activity rather than "specific, immutable objects" (App. B, at p. 35a) is a distinction without any practical or legal significance. Whether the government's subsequent search expands the scope of the private citizen's initial search is not dependent upon whether the object of the search continually changes (such as ongoing criminal activity) or remains constant (such as contraband). Rather, it is the nature of the government's own actions which determines if a warrant is required to continue what began as a private search. Thus, for example, the need for a search warrant does not turn upon whether the package first searched by the private party is left opened or is resealed before being reexamined by the police. *United States v. Moore*, 943 F.2d at 888. Had the informant happened upon the illicit fruits of respondents' labor, her invitation to the police to see what she had seen and to confirm the presence of contraband would not have required that a search warrant first be obtained. *Illinios v. Andreas*, 463 U.S. at 769 n.2; *United States v. Clutter*, 914 F.2d at 779. By focusing on the character of the object of the search and not the search itself, the New Jersey state courts allow fortuitous criminals, like these respondents, to go free even though the third party has observed them committing crimes.

B. Under The Federal Third Party Intervention Doctrine, Once Privacy Interests In Ongoing Criminal Activity Have Been Frustrated In Full By The Private Party, Subsequent Observations By The Police Of The Same Ongoing Illegal Activity Is Not Tantamount To Unconstitutional Governmental Action.

The Supreme Court of New Jersey found that the "extended and continuous police surveillance [w]as a significant expansion of the informant's prior observation of the activities conducted in the adjacent basement." (App. A, at p. 3a). While on the surface this seems to suggest that the state supreme court correctly focused on the scope of the government's conduct rather than on the character of the object of the search, the court's conclusion, based in large measure on the dissenting opinion of the lower appellate court, nonetheless needs redress because it utterly ignores this Court's analysis of frustration of privacy interests undertaken in *Walter v. United States* and *United States v. Jacobsen.*

This Court has noted that a third party's inspection of contraband may be so complete that there is no additional search by the government when it re-examines the materials. *Walter v. United States*, 447 U.S. at 659 n.14. This being true, it makes no difference at all how many times a police officer duplicates the third party's original efforts. By looking through the existing gaps in the partition through which the informant had already watched respondents' activities on numerous dates, Investigator Cassidy did not infringe upon any constitutionally protected privacy interest that had not already been frustrated in full by the private search. *United States v. Jacobsen*, 466

U.S. at 119-20; *United States v. Livesay*, 983 F.2d 135, 136 (8th Cir. 1993); *United States v. Moore*, 943 F.2d at 888. Nor did his conduct enable him to learn anything that had not previously been learned during the informant's search, *United States v. Jacobsen*, 466 U.S. at 120; *United States v. Clutter*, 914 F.2d at 779, even if his several observations into respondents' basement "took more time and were more thorough," because the illicit character of respondents' cocaine packaging operation had already been determined by the informant. *United States v. Simpson*, 904 F.2d 607, 610 (11th Cir. 1990).

By failing to cover up or seal the obvious holes and gaps in the party wall separating the two basements, respondents assumed the risk that their curious neighbor would watch them engage in licit as well as illicit behavior and, in turn, report their illegal activities to the police.

> It is well settled that when an individual reveals private information to another, he assumes the risk that his confidant will reveal that information to the authorities, and if that occurs the Fourth Amendment does not prohibit governmental use of that information. Once frustration of the original expectation of privacy occurs, the Fourth Amendment does not prohibit governmental use of the now nonprivate information: "This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information

> is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in a third party will not be betrayed."

United States v. Jacobsen, 466 U.S. at 117, *citing United States v. Miller*, 425 U.S. 435, 443 (1976). We "do not live in a vacuum," *United States v. Mankani*, 738 F.2d 538, 542 (2d Cir. 1984), and persons hoping to claim a legitimate expectation of privacy must not be insensitive to their physical surroundings and indiscriminate in their conversations and actions. Respondents' reasonable privacy expectations in their daily activities carried on in the basement, including the packaging of "rock" cocaine, were frustrated in full when their neighbor peered through openings in the party wall; Investigator Cassidy was free, therefore, to use the information he himself obtained by the same means without implicating and violating the Fourth Amendment. *United States v. Jacobsen*, 466 U.S. at 117; *Walter v. United States*, 447 U.S. at 665 (Blackmun, J., dissenting); *United States v. Jenkins*, 46 F.3d at 459; *United States v. Felton*, 753 F.2d 256, 261 (5th Cir. 1985).

In sum, in refusing to extend the third party intervention doctrine to instances where the police are alerted by concerned citizens to ongoing criminal activity, in contrast to tangible, immutable evidence, the Supreme Court of New Jersey has misconstrued Fourth Amendment law as applied by this Court in *United States v. Jacobsen* and *Walter v. United States*, and has "depart[ed] from the commonsense approach to an obvious fact situation." *Walter v. United States*, 447 U.S. at 666 (Blackmun, J., dissenting). Review by this Court is warranted to correct the state court's opinion and judgment, as well as to set forth guidelines for federal and local law enforcement

agencies to follow when notified of ongoing criminal activity observed by a third party.

CONCLUSION

Based on the foregoing, petitioner urges the granting of this petition for a writ of *certiorari*.

Respectfully submitted,

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APPENDIX

APPENDIX A

SUPREME COURT OF NEW JERSEY
A-76/77/78
September Term 1994

STATE OF NEW JERSEY,
Plaintiff-Respondent,

v. A-76

EDDIE SAEZ,
Defendant-Appellant.

STATE OF NEW JERSEY,
Plaintiff-Respondent,

v. A-77

ORLANDO NAVARRO,
Defendant-Appellant.

STATE OF NEW JERSEY,
Plaintiff-Respondent,

v. A-78

LUIS SAEZ,
Defendant-Appellant.

Argued January 3, 1995 -- Decided February 23, 1995

On appeal from the Superior Court, Appellate Division, whose opinion is reported at 268 *N.J. Super.* 250 (1993).

Lorraine J. Betancourt argued the cause for appellant Eddie Saez (*A. Kenneth Weiner*, attorney).

Ruth Bove, Assistant Deputy Public Defender, argued the cause for appellants Luis Saez and Orlando Navarro (*Susan L. Reisner*, Public Defender, attorney).

Mark P. Stalford, Assistant Prosecutor, argued the cause for respondent (*John Kaye*, Monmouth County Prosecutor, attorney; *John M. Caruso*, Assistant Prosecutor, on the briefs).

Lisa Sarnoff Gochman, Deputy Attorney General, argued the cause for *amicus curiae*, Attorney General of New Jersey (*Deborah T. Poritz*, Attorney General, attorney).

PER CURIAM

Defendants appeal as of right on the basis of the dissent in the Appellate Division. *R.* 2:2-1(a). We reverse the judgment of the Appellate Division substantially for the reasons set forth in Judge D'Annunzio's dissenting opinion. 268 *N.J. Super.* 250, 270-79 (1993). Although we do not imply that the third-party intervention exception applies only when the informant previously has reduced to possession the objects

viewed by law-enforcement officials, we are generally in accord with the dissenting opinion's analysis that described the extended and continuous police surveillance as a significant expansion of the informant's prior observation of the activities conducted in the adjacent basement. *Id.* at 272-73.

Because the majority and the dissenting member of the Appellate Division panel agreed that defendants retained a reasonable expectation of privacy in respect of their activities in the basement apartment, and that under the circumstances the extended surveillance of the activities conducted in the adjacent basement was not a reasonable search otherwise justified by the plain-view exception to the requirement for a search warrant, that issue is not before us and we do not address it.

Judgment reversed. The matter is remanded to the Law Division for retrial.

CHIEF JUSTICE WILENTZ and JUSTICES HANDLER, POLLOCK, O'HERN, GARIBALDI, STEIN, and COLEMAN join in this opinion.

SUPREME COURT OF NEW JERSEY

No. A-76/77/78 September Term 1994

ON APPEAL FROM Appellate Division, Superior Court

ON CERTIFICATION TO _____

STATE OF NEW JERSEY,
Plaintiff-Respondent,

v. A-76

EDDIE SAEZ,
Defendant-Appellant.

STATE OF NEW JERSEY,
Plaintiff-Respondent,

v. A-77

ORLANDO NAVARRO,
Defendant-Appellant.

STATE OF NEW JERSEY,
Plaintiff-Respondent,

v. A-78

LUIS SAEZ,
Defendant-Appellant.

DECIDED February 23, 1995
Chief Justice Wilentz Presiding
OPINION BY Per Curiam
CONCURRING OPINION BY _____
DISSENTING OPINION BY _____

CHECKLIST	REVERSE & REMAND		
CHIEF JUSTICE WILENTZ	X		
JUSTICE HANDLER	X		
JUSTICE POLLOCK	X		
JUSTICE O'HERN	X		
JUSTICE GARIBALDI	X		
JUSTICE STEIN	X		
JUSTICE COLEMAN	X		
TOTALS	7		

APPENDIX B

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-4035-90T1
A-4189-90T1
A-4347-90T4

STATE OF NEW JERSEY,
Plaintiff-Respondent,

v.

EDDIE SAEZ,
Defendant-Appellant.

STATE OF NEW JERSEY,
Plaintiff-Respondent,

v.

LUIS SAEZ,
Defendant-Appellant.

STATE OF NEW JERSEY,
Plaintiff-Respondent,

v.

ORLANDO NAVARRO,
Defendant-Appellant.

Argued: April 19, 1993 - Decided November 12, 1993

Before Judges Long, D'Annunzio and Keefe.

On appeal from the Superior Court, Law Division, Monmouth County.

Lorraine J. Betancourt argued the cause for appellant Eddie Saez (A. Kenneth Weiner, attorney, Ms. Betancourt on the brief).

Kim A. Fellenz argued the cause for appellant Luis Saez (Steinberg & Fellenz, attorneys, Ms. Fellenz on the brief).

Zulima V. Farber, Public Defender, attorney for respondent Orlando R. Navarro (Vincent James Sanzone, Jr., Designated Counsel, of counsel and on the brief).[1]

[1]Appellant Navarro's case was not argued.

Patricia Quelch argued the cause for respondent State of New Jersey, (John Kaye, Monmouth County Prosecutor, attorney, Mark P. Stalford, of counsel)[2]

The opinion of the court was delivered by KEEFE, J.A.D.

Several issues are presented by this appeal. However, the issue that divides the court is the question of whether the observation by a police officer of illegal conduct through a basement party wall at the invitation of a tenant informant was an unconstitutional warrantless search. The majority concludes that it was not.

Defendants Eddie Saez, Luis Saez and Orlando Navarro were the subject of a nine count indictment charging them with: Count One, maintaining or operating a CDS production facility, contrary to the provisions of *N.J.S.A.* 2C:35-4 (first degree); Count Two, possession of Cocaine contrary to the provisions of *N.J.S.A.* 2C:35-10a (third degree); Count Three, possession of cocaine within 1,000 feet of school property, contrary to the provisions of *N.J.S.A.* 2C:35-10 (third degree); Count Four, possession of cocaine in a quantity of one-half ounce or more, with the intent to distribute, contrary to the provisions of *N.J.S.A.* 2C:35-5b(2) (second degree); Count Five, possession of cocaine with intent to distribute within 1,000 feet of school property, contrary to the provisions of *N.J.S.A.* 2C:35-7 and

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[2]The above matters were calendared back-to-back because they arose out of the same indictment and involved similar issues. They have been consolidated for the purpose of this opinion.

N.J.S.A. 2C:35-5b(2) (third degree); Count Six, possession of heroin, contrary to the provisions of *N.J.S.A.* 2C:35-10a(1) (third degree); Count Seven, possession of heroin within 1,000 feet of school property, contrary to the provisions of *N.J.S.A.* 2C:35-10 (third degree); Count Eight, possession of heroin with the intent to distribute, contrary to the provisions of *N.J.S.A.* 2C:35-5b(3) (third degree); and Count Nine, possession of heroin with the intent to distribute within 1,000 feet of school property, contrary to the provisions of *N.J.S.A.* 2C:35-7 and *N.J.S.A.* 2C:35-5b(3) (third degree).

Defendant's motion to suppress evidence relevant to the indictment was denied. Thereafter, they were tried to a jury who found Eddie Saez and Orlando Navarro guilty of counts one through five of the indictment, and found Luis Saez guilty as to all counts of the indictment.

The State's motion for extended term sentencing of Luis and Eddie Saez was granted. Eddie Saez was sentenced to a presumptive 50 year extended term with a 20 year parole disqualifier, and a $150,000 fine. Luis Saez was sentenced to a presumptive 50 year prison term with a 17 year parole disqualifier and the same fine. Orlando Navarro was sentenced to a 15 year prison term with a 5 year parole disqualifier and a $50,000 fine. Appropriate DEDR penalties, VCCB penalties and laboratory fees were imposed as to all defendants.

On appeal, the following issues are presented for resolution.

POINT I: DID THE TRIAL JUDGE ERR IN DENYING THE MOTION TO SUPPRESS EVIDENCE?

POINT II: DID THE TRIAL JUDGE ERR IN ADMITTING INTO EVIDENCE AN UNCERTIFIED SCHOOL ZONE MAP?[3]

POINT III: DID THE TRIAL JUDGE ERR IN DENYING DEFENDANTS' MOTION FOR JUDGMENT OF ACQUITTAL AT THE END OF THE STATE'S CASE?

POINT IV: DID THE TRIAL JUDGE ERR IN FAILING TO PERMIT THE DEFENDANTS TO CALL ASSISTANT MONMOUTH COUNTY PROSECUTOR PETER WARSHAW AS A WITNESS?

POINT V: DID THE ASSISTANT PROSECUTOR MAKE IMPROPER COMMENTS IN HIS SUMMATION?

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[3]Defendant Navarro does not join defendants Saez in issues II through VI.

POINT VI: DID THE TRIAL JUDGE ERR IN FAILING TO CHARGE "MANUFACTURING" BOTH AS TO *N.J.S.A.* 2C:35-4 AND *N.J.S.A.* 2C:35-5?

POINT VII: WAS THE SENTENCE IMPOSED ON DEFENDANT LUIS SAEZ AND ORLANDO NAVARRO MANIFESTLY EXCESSIVE?

For the reasons stated herein, we affirm the convictions of all three defendants, and the sentence imposed as to defendants Luis Saez and Orlando Navarro.[4]

On May 15, 1990, Investigators Cassidy and West, affiliated with the Monmouth County Narcotics Strike Force, met with a citizen-informant, who at the time was living at 111A Fifth Avenue in Asbury Park, New Jersey. During the meeting, the informant related that she had observed narcotic activity several times over the last month, occurring in the basement of the adjoining residence, 111B Fifth Avenue. The building containing 111A and 111B Fifth Avenue is a one-story ranch type house with two separate entrances. The basement of the building is divided by a wooden wall constructed, as the trial judge observed, in a "somewhat slap-dash [method] in that certain types of wood are used in one part, other types used in the area in question, vertical slats in one part, horizontal slats in another." The informant stated that she was able to observe the

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[4]At the request of the Appellate Division Points II through VII of the opinion have been omitted from publication.

activity through holes or gaps in the wood partition.[5] The informant identified the occupant of the adjacent premises as defendant Eddie Saez. She said that Saez was accompanied by at least one other hispanic male, and that the activities usually took place around dinner time, although not on a daily basis. The informant had supplied information to the Task Force in the past, in connection with other apparently successful undercover investigations. She invited the investigators to observe the activity.

Based on the information received from the informant, a decision was made to set up an undercover investigation of the property. On May 16, 1990, Cassidy drove by the premises and made observations as to cars in the driveway, as well as the physical condition of the property. He also investigated into Eddie Saez's background, and discovered that Eddie Saez had previously been involved in narcotics related incidents.

On May 17, 1990, at approximately 5:40 p.m. Cassidy arrived at 111A Fifth Avenue, and was admitted to the basement by the tenant-informant. Cassidy testified at the suppression hearing that he was able to observe activity in the basement almost immediately upon his entry. He observed Eddie and Luis Saez, and another unknown hispanic male, in the process of "rerocking" cocaine. The process described is one of adding filler to cocaine and then adding water, thereafter compressing it until it becomes hard or rock-like. After the substance was formed into a rock-like appearance, the unidentified hispanic male cut the rocks into smaller pieces and

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[5]The holes and gaps through which the observations were made were confirmed by photographs introduced at the suppression hearing.

placed them into small plastic bags.

Cassidy was able to make these observations through little holes and through horizontal cracks in the wooden wall. He also testified that he used a piece of broken mirror that he had found in the basement, and, while holding it over his head, he could see the activity in the adjoining basement through a gap in the wall located above a furnace. Cassidy admitted that this activity could not have been seen through basement windows located in the adjoining basement because they had been painted over and covered with cloth material.

Approximately thirty minutes into his observations, Cassidy saw a dark colored Toyota Celica enter the driveway of 111B. The vehicle was driven by a person later identified as defendant Navarro. Navarro entered the basement and assumed the duties of the unidentified participant who then left the premises.[6]

During his observations of the activities, Cassidy would occasionally leave his point of observation so that he could transmit information to other members of the Task Force by radio. Upon returning to the basement wall after making one of those transmissions, Cassidy observed that the rerocking activity had ceased, and that Luis Saez and Orlando Navarro were leaving the premises, carrying an aerosol can and a package of aluminum foil. He immediately radioed that

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[6]The unidentified participant was never apprehended.

information to the surveillance team.[7]

After Cassidy's transmission, the investigation was taken over by members of the Task Force outside of the premises. The Toyota Celica was followed to a location in Asbury Park which was later determined to be the residence of defendant Luis Saez. Sergeant Campbell of the Task Force, and a uniformed Asbury Park police officer, approached the vehicle. Campbell testified that Luis Saez opened the door and attempted to run from the scene. Campbell apprehended him and obtained a small tin foil package from his hand. Campbell inferred from his observation that the package in all likelihood contained cocaine and placed Saez under arrest. Navarro was also secured and arrested, and Asbury Park police officer Kirschenbaum was directed to take custody of the vehicle and drive it to the impoundment area of the Asbury Park police station.

Kirschenbaum testified that as soon as he entered the vehicle, he could see an aerosol can on the floor on the passenger side of the car. At police headquarters, Kirschenbaum commenced a search of the vehicle, including the aerosol can. He noted that the can was a rather worn old can of Gunk, with a bottom which looked as though it had been cut. He shook the can, and determining it to be dead weight rather than sounding like an aerosol can, proceeded to remove the bottom. Inside the can, he found rock cocaine, as well as bags of heroin.

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[7]Apparently, aerosol cans are routinely used to transport drugs by cutting open the bottom of the can, inserting the substance, and replacing the false bottom to the can.

Although Luis Saez and Orlando Navarro were arrested on the evening of May 17, 1990, defendant Eddie Saez was not. Apparently the reason for not arresting him was so that further observations of his conduct could be made from the basement adjoining 111A. Subsequent observations by Cassidy did not prove fruitful. However, the informant apparently did see additional activity on or about May 25, 1990. Based upon that information a search warrant was issued on May 29, 1990.[8] The warrant, executed on June 3, 1990, produced evidence of narcotic activity: a blue mixing bowl, a spoon, pieces of aluminum foil, and a number of small plastic bags inside a larger bag. Defendant Eddie Saez was arrested at that time.

I.

Defendants contend on appeal, as they did in the trial court, that Cassidy's observations through the common wall of the basement constituted a search; and, because the search was warrantless and fell within none of the exceptions to the requirement for a warrant, it was unconstitutional. They further reason that, because Cassidy's observations constituted an unconstitutional search, all arrests and subsequent searches were the fruits of the poisonous tree.

The critical question to be answered is whether the Fourth Amendment to the United States Constitution or Article I, paragraph 7 of the New Jersey Constitution required Investigator Cassidy to obtain a search warrant before making observations through the common wall dividing the basement of

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[8]The first warrant, issued on May 18, 1990 based upon information of the events of May 17, 1990, was not executed and was permitted to lapse.

defendant Eddie Saez's premises from that of the informant. In the circumstances of this case, we perceive no difference in the outcome whether the issue is analyzed under federal or state law.

Under either constitutional provision, a search takes place when an expectation of privacy that society is prepared to consider reasonable is infringed. *United States v. Jacobsen*, 466 *U.S.* 109, 113, 104 *S.Ct.* 1652, 1656, 80 *L.Ed.*2d 85, 94 (1984); *State v. Hempele*, 120 *N.J.* 182, 198-200 (1990). Further, objective "[e]xpectations of privacy are established by general social norms." *State v. Hempele, supra*, 120 *N.J.* at 200, quoting *Robbins v. California*, 453 *U.S.* 420, 428, 101 *S.Ct.* 2841, 2847, 69 *L.Ed.*2d 744, 751 (1981) (plurality opinion), overruled on other grounds, *United States v. Ross*, 456 *U.S.* 798, 102 *S.Ct.* 2157, 72 *L.Ed.*2d 572 (1982). However, the search and seizure clause of neither the United States nor the New Jersey constitutions protects citizens from unreasonable searches by private parties. *United States v. Jacobsen, supra*, 466 *U.S.* at 113-14, 104 *S.Ct.* at 1656, 80 *L.Ed.*2d at 94 (1984); *Hennessey v. Coastal Eagle Point Oil Co.*, 129 *N.J.* 81, 95 (1992).

New Jersey has, in some instances, departed from the federal search and seizure analysis where we have found that our Constitution "affords our citizens greater protection against unreasonable searches and seizures than does the fourth amendment." *State v. Hempele, supra*, 120 *N.J.* at 195, quoting *State v. Novembrino*, 105 *N.J.* 95, 145 (1987). Indeed, *Hempele* was one such example. In that case, the New Jersey Supreme Court found that New Jersey citizens have a reasonable expectation of privacy in garbage left at the curb for

collection under the New Jersey Constitution, although they may not be afforded such protection under the federal constitution. *Id.* at 215. This somewhat different conclusion, resulting from an analysis of the same facts under two nearly identical constitutional provisions, is explained in *Hempele* as being a result of "the diversity of laws, customs, and mores within [this country]." *Id.* at 197. However, regardless of the possibility of differing results stemming from an analysis under either the federal or State search and seizure clause, our Supreme Court, nonetheless, acknowledges a common ground for search and seizure protection reflecting "our societal understanding that certain areas deserve the most scrupulous protection from government invasion." *Id.* at 200, quoting *Oliver v. United States*, 466 *U.S.* 170, 178, 104 *S.Ct.* 1735, 1741, 80 *L.Ed.*2d 214, 224 (1984).

We are satisfied that both the United States Supreme Court and our own Supreme Court would conclude, under the facts of this case, that a person conducting activities within the confines of his own residence, and taking precautions to have those activities obscured from public view, would have a reasonable expectation of privacy in such activities. Defendants here did not knowingly expose their activities to public view. See *Katz v. United States*, 389 *U.S.* 347, 88 *S.Ct.* 507, 19 *L.Ed.*2d 576 (1967); *State v. Foley*, 218 *N.J. Super.* 210 (App. Div. 1987); *State v. O'Herron*, 153 *N.J. Super.* 570 (App. Div. 1977),*cert. denied*, 439 *U.S.* 1032, 99 *S.Ct.* 637, 58 *L.Ed.*2d 695 (1978). While defendants may have been negligent in shielding their activities from their common neighbor, their expectations as to government intrusion can be viewed differently. As noted by our Supreme Court in *Hempele*,

> [a]lthough a person may realize that an unwelcome scavenger might sort through his or her garbage, "such expectations would not necessarily include a detailed, systemized inspection of the garbage by law enforcement personnel."
>
> [*Hempele, supra*, 120 *N.J.* at 205, quoting State v. Smith, 510 *P.*2d 793, 803 (Alaska),*cert. denied*, 414 *U.S.* 1086, 94 *S.Ct.* 603, 38 *L.Ed.*2d 489 (1973)].

Thus, we conclude, contrary to the trial judge's findings, that defendants had a reasonable expectation of privacy in their premises. *State v. Smith*, 37 *N.J.* 481 (1962),*cert. denied*, 374 *U.S.* 835, 83 *S.Ct.* 1879, 10 *L.Ed.*2d 1055 (1963), relied upon by the trial judge, is clearly distinguishable. In that case, the detectives made an observation of activities in the defendant's apartment from a common hallway where any member of the public, including the police officers, had a right to be. In that instance, the defendant made insufficient effort to protect his conduct from public view. That is not the situation in the current case. Here, defendants painted and covered the windows exposed to the public.

However, the conclusion that defendants had an expectation of privacy as to government intrusion does not end the inquiry. Although a warrantless search is prima facie invalid, the invalidity may be overcome if the search falls within one of the specific exceptions created by decisional law. *State v. Hill*, 115 *N.J.* 169, 173 (1989). One of those exceptions recognized both by our Supreme Court and the United States

Supreme Court is the "third party intervention" exception discussed in *United States v. Jacobsen, supra. State v. Hill, supra*, 115 *N.J.* at 173. See also *State v. Mollica*, 114 *N.J.* 329, 355 (1989).

Contrary to defendants' argument, this case is not controlled by *State v. Hempele, supra.* Although *Hempele* found a reasonable expectation of privacy in garbage, and further found that the police inspection of such garbage constituted an unreasonable search, the Court had no occasion to decide whether there would have been a search had a scavenger or refuse collector (third party intervenors) observed contraband, and subsequently invited the police to observe what they had seen. No case in our jurisdiction has addressed such an issue. However, the United States Supreme Court did so in *Jacobsen.*

In *United States v. Jacobsen, supra*, employees of Federal Express damaged a package that had been placed in its care for delivery to a third party. Their examination of the damaged container revealed a ten inch tube made of silver duct tape. The office manager cut open the tube and found a zip lock plastic bag containing three other plastic bags. The inner most bags contained about six and one-half ounces of white powder. Obviously suspecting drug activity, they then notified the Drug Enforcement Administration.

Upon receiving the information, a federal agent arrived at the Federal Express premises. By that time, the plastic bags had been placed back in the tube and the tube placed back in the carton. The agent saw that one end of the tube had been slit open. He removed the four plastic bags from the tube and saw

the white powder. He then opened each of the four bags and removed a trace of the white substance with a knife blade. A field test identified the substance as cocaine. Defendant was arrested as a result of the observations made by the agent.

The United States Supreme Court had no difficulty finding that defendant had an expectation of privacy in the package delivered to Federal Express. However, it determined that the invasion of defendant's privacy was occasioned by private action, and regardless of whether that invasion was accidental or deliberate, reasonable or unreasonable, it did not violate the Fourth Amendment because of its private character. *United States v. Jacobsen, supra*, 466 *U.S.* at 115, 104 *S.Ct.* at 1657, 80 *L.Ed.*2d at 95. The Court reasoned:

> Respondents do not dispute that the Government could utilize the Federal Express employees' testimony concerning the contents of the package. If that is the case, it hardly infringed respondents' privacy for the agents to reexamine the contents of the open package by brushing aside a crumpled newspaper and picking up the tube. The advantage the Government gained thereby was merely avoiding the risk of a flaw in the employees' recollection, rather than in further infringing respondents' privacy. Protecting the risk of misdescription hardly enhances any legitimate privacy interest, and is not protected by the Fourth Amendment. Respondents could have no privacy interest in the contents of the package, since it remained unsealed and since

> the Federal Express employees had just examined the package and had, of their own accord, invited the federal agent to their offices for the express purpose of viewing its contents. The agent's viewing of what a private party had freely made available for his inspection did not violate the Fourth Amendment.
>
> [*Id.* at 119-20, 104 *S.Ct.* at 1659-60, 80 *L.Ed.*2d at 98.]

The Fourth Amendment is not implicated unless the police officer expands the scope of the invasion and uses "information with respect to which the expectation of privacy has not already been frustrated." *Id.* at 117, 104 *S.Ct.* at 1658-59, 80 *L.Ed.*2d at 97. Under the circumstances of that case, the Jacobsen Court concluded that the agent's viewing of the contents of the package, as well as his subsequent testing of its contents, did not infringe upon a legitimate expectation of privacy because a prior invasion of privacy had already occurred, and, thus, was not a search within the meaning of the Fourth Amendment. *Id.* at 120, 104 *S.Ct.* at 1660, 80 *L.Ed.*2d at 98.

Applying the principles of Jacobsen to this case, we conclude that the initial invasion of defendants' privacy was occasioned by the private action of the citizen informant. Defendant do not contend that the citizen informant was an agent or employee of the government. See *State v. Mollica*, *supra*, 114 *N.J.* at 355. Clearly, the informant could have testified, as could the Federal Express employees in *prima facie*, as to her observations of defendants' conduct. The police officer was invited by the informant to observe what she had

seen. His observations went no further than that of the informant's in frustrating or infringing upon defendants' privacy. Thus, we conclude that the police conduct under these circumstances was not an unreasonable search in violation of either the State or the federal constitutions.

II.

Defendants Saez contend that the trial judge erred by admitting "an uncertified map" into evidence in connection with their prosecution under *N.J.S.A.* 2C:35-7. We find no error and affirm.

In order to prove the location of "school property" under *N.J.S.A.* 2C:35-7, the State may produce "*prima facie* evidence of the location and boundaries of those areas" by use of "a map produced or reproduced by any municipal or county engineer for the purpose of depicting the location and boundaries" of such areas "provided that the governing body of the municipality or county has adopted a resolution or ordinance approving the map[.]" *N.J.S.A.* 2C:35-7. The statute does not require that the map itself contain a certification of its authenticity. The statute merely requires the map to be admitted "upon proper authentication[.]" *N.J.S.A.* 2C:35-7.

In this case the school zone map marked into evidence was properly authenticated by reference to the ordinance which adopted the map. The ordinance itself was certified by the municipal clerk. Such mode of authentication was "sufficient to sustain a finding of its authenticity[.]" *Evid. R.* 67.

III.

Defendants maintain that the State did not present sufficient evidence to establish that the Saez defendants were guilty of maintaining or operating premises used for the "manufacture" of certain controlled dangerous substances in violation of *N.J.S.A.* 2C:35-4, a first degree offense. Both defendants maintain that the evidence was insufficient in that the State failed to prove the presence of "other types of paraphernalia such as large scales" or "any amounts of money."

"Manufacture" is defined in *N.J.S.A.* 2C:35-2 as

> the production, preparation, propagation, compounding, conversion or processing of a controlled dangerous substance or controlled substance analog, either directly or by extraction from substances of natural origin, or independently by means of chemical synthesis, or by combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container[.]

That definition is incorporated in *N.J.S.A.* 2C:35-4. *See* Cannel, *New Jersey Criminal Code Annotated*, legislative Comment on *N.J.S.A.* 2C:35-4 (1987). In *State v. Miles*, 231 *N.J. Super.* 27 (App. Div. 1989) this court found that where defendant purchased cocaine and heroin in bulk, diluted the substances with cutting agents, and packaged them for sale in units of small quantities, such activities fell within the purview of the prohibition against manufacturing.

Investigator Cassidy described defendants' activities as the process of "rerocking" cocaine. That process includes the adding of filler to cocaine, mixing it, adding water, and then compressing it until the mixture becomes hard, or rock-like. The word manufacture "includes any packaging or repackaging of the substance." *N.J.S.A.* 2C:35-2. The activities observed by Cassidy sufficiently described a processing and repackaging facility. Such activity is within the purview of the statute. Giving the State the benefit of all favorable inferences, a reasonable jury could find guilt beyond a reasonable doubt. *State v. Reyes*, 50 *N.J.* 454, 458-59 (1967). Therefore, the trial judge did not err in denying the Saez defendants' motion for judgment of acquittal.

IV.

During his initial trial testimony, Investigator Cassidy indicated that he had seen defendants Luis Saez and Orlando Navarro at 111B Fifth Avenue subsequent to their arrest on May 17, 1990, and before the search warrant was executed on June 3, 1990. In fact, those defendants were incarcerated during that period of time and, therefore, could not have been seen by Cassidy.

When Cassidy was recalled to the witness stand, he testified that he had been mistaken concerning those observations. His explanation was as follows:

> After I left the courtroom, . . . I realized I had made a mistake. When Prosecutor Warshaw left the courtroom, I advised him of that and he

> advised me that he was aware of that and it was already brought to his attention and instructed me to check with the record.

Defendants made an application to call the assistant prosecutor as a witness for the purpose of proving that the mistake in Cassidy's initial testimony was brought to his attention by the assistant prosecutor, rather than Cassidy's self-realization that he had made a mistake. The trial judge denied the application observing that such testimony would juxtapose the credibility of Cassidy against that of the assistant prosecutor. He believed that the "highly unusual procedure" would run the risk of jeopardizing the assistant prosecutor's ability to prosecute the case. Although he found that Cassidy's credibility was a relevant issue, he concluded that the prejudice outweighed the probative value under Evid. *R.* 4. We find no abuse of discretion in that ruling and affirm essentially for the reasons stated by the trial judge.

V.

The Saez defendants contend that the prosecutor made improper remarks in his summation impacting both defendants' right not to testify and the trial tactics used by their respective attorneys. Our review of the prosecutor's summation satisfies us that his comments concerning Investigator Venezia's testimony relative to defendants' intent to distribute the drugs was no more than fair comment on the strength and credibility of that testimony. He did not suggest that the defendants should have been expected to testify in order to refute Venezia's testimony. He merely observed that Venezia's testimony was unimpaired by cross-examination. The comments were clearly

not egregiously inappropriate, and did not have the capability of denying defendants a fair trail. *State v. Biegenwald*, 106 *N.J.* 13, 40 (1987).

VI.

Defendants Saez contend that, although they were indicted for maintaining or operating a controlled dangerous substance production facility under *N.J.S.A.* 2C:35-4, the trial judge should also have charged the jury with the manufacturing offense set forth in *N.J.S.A.* 2C:35-5. Defendants admit that the definition of "manufacture" contained in *N.J.S.A.* 2C:35-2 applies to both offenses. They do not contend that the offense described in *N.J.S.A.* 2C:35-5 is a lesser included offense of the offense charged *N.J.S.A.* 2C:35-4. Indeed, it is not. Although *N.J.S.A.* 2C:35-5 differentiates between a first and second degree offense depending upon the weight of the cocaine, *N.J.S.A.* 2C:35-4 is a first degree offense regardless of the amount of cocaine produced. In a prosecution under *N.J.S.A.* 2C:35-4, the amount of cocaine involved is relevant only to prove that the substance being produced is not for personal use. That is so because *N.J.S.A.* 2C:35-2 exempts from the definition of manufacture "the preparation or compounding of a controlled dangerous substance or controlled substance analog by an individual for his own use[.]" *N.J.S.A.* 2C:35-2.

The Legislature was obviously aware of the interrelationship between *N.J.S.A.* 2C:35-4 and *N.J.S.A.* 2C:35-5 and elected to give the State the choice of the statute under which it elected to proceed. The legislative commentary to 2C:35-4 confirms our understanding:

> It is expected that many persons covered under this section could also be prosecuted for the separate offense of manufacturing, distributing or dispensing a controlled dangerous substance in violation of *N.J.S.A.* 2C:35-5. Unlike 2C:35-5, however, the offense defined in this section is designated as a first degree crime without regard to the quantity or purity of the controlled substances involved, provided that the particular substance produced in the illegal laboratory was one of those which are specifically identified in this section.
>
> [Cannel, *New Jersey Criminal Code Annotated*, 1987 Legislative Commentary on *N.J.S.A.* 2C:35-4.]

The legislative intent in passing *N.J.S.A.* 2C:35-4 was to prosecute

> those offenders who maintain or operate any premises, place or facility which is used for the unlawful manufacture of certain specified controlled substances . . . which includes . . . cocaine.
>
> [*Id.*]

The Legislature considered such conduct to be

> an especially serious offense, since such commercial operations have become

> indispensable and prolific source for controlled substances . . . which then enter the illicit stream of commerce and are distributed throughout the State.
>
> [*Id.*]

Although the facility maintained in defendant Eddie Saez's basement was certainly not sophisticated, the "rerocking" process described by Cassidy and the amount produced was not for personal use as opined by Investigator Venezia. As such, defendants' conduct clearly met the criteria of "manufacture" under 2C:35-2 in the context of maintaining a facility for such purpose as proscribed by 2C:35-4. *State v. Miles*, *supra*, 231 *N.J. Super.* at 30.

Because *N.J.S.A.* 2C:35-5 is not a lesser included offense of *N.J.S.A.* 2C:35-4, the trial judge was not obligated to instruct the jury on that statute. See *State v. Crisantos*, 102 *N.J.* 265 (1986). The State had sufficient evidence to prove a violation of *N.J.S.A.* 2C:35-4. Thus, the trial judge did not err in refusing to instruct the jury on the offense described in *N.J.S.A.* 2C:35-5.

VII.

Defendant Luis Saez and defendant Orlando Navarro contend that the sentences imposed were excessive. Luis Saez received a presumptive extended term sentence, and Navarro received the presumptive sentence for his first degree conviction under *N.J.S.A.* 2C:35-4.

Saez contends that he was not the "ringleader," but a "pawn" who took orders from his brother. He also points to his family circumstances, and the fact that he is a victim of drugs, to argue that the presumptive sentence imposed was excessive. Navarro contends that the trial judge inappropriately double counted certain aggravating factors, whereas, in fact, the mitigating factors outweighed the aggravating factors and required a sentence less than the presumptive term. We have reviewed the record in light of the arguments and conclude that they are without merit. There was no basis in this record for the trial judge to have ordered a prison term of less than the presumptive term for either defendant. See *State v. Hodge*, 95 *N.J.* 369 (1984).

The judgments of conviction under review are affirmed in all respects.

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-4035-90T1
A-4189-90T1
A-4347-90T4

STATE OF NEW JERSEY,
Plaintiff-Respondent,

v.

EDDIE SAEZ,
Defendant-Appellant.

STATE OF NEW JERSEY,
Plaintiff-Respondent,

v.

LUIS SAEZ,
Defendant-Appellant.

STATE OF NEW JERSEY,
Plaintiff-Respondent,

v.

ORLANDO NAVARRO,
Defendant-Appellant.

D'ANNUNZIO, J.A.D., dissenting

Regarding the visual surveillance by the police of Eddie Saez's basement, I agree with the majority's preliminary conclusion that Eddie Saez had a reasonable and legitimate expectation of privacy as to his activities in the basement of his residence. I disagree, however, with the majority's application of the "third party intervention" exception to the facts of this case.

United States v. Jacobsen, 466 *U.S.* 109, 104 *S.Ct.* 1652, 80 *L.Ed.*2d 85 (1985), is an example of the typical third-party intervention case. In that case, the reader will recall, employees of a shipping company had examined the contents of a damaged container, going so far as to open a duct-tape tube. Their examination revealed six and a half ounces of white powder, suspected to be illicit drugs. Based on the information provided by the employees, a Drug Enforcement Administration (DEA) agent reexamined the contents of the damaged containers. Because the initial violation of defendant's privacy was the result of private action, the Court found no Fourth Amendment violation in the agent's reexamination of the

package.

United States v. Moore, 943 *F.*2d 884 (8th Cir.1991), is another example of the third intervention exception. In that case, Halbert, a shipping company employee, took a loosely wrapped vacuum cleaner box to a re-wrap station. Halbert observed a wad of currency when he opened the box. He resealed the box and reported his find to the DEA, whose agent reopened the box to observe the currency. The court of appeals affirmed the trial court's denial of defendant's motion to suppress the currency because the agent's search "did not exceed the scope of Halbert's initial private search." *Id.* at 888.

In *United States v. Walsh*, 791 *F.*2d 811 (10th Cir.1986), an airline employee found a briefcase near a baggage carousel at an airport. Another airline employee opened the briefcase in search of identification because its exterior contained no information regarding ownership. The case contained illegal firearms and was turned over to an agent of the Bureau of Alcohol, Tobacco and Firearms, who also examined the case's contents. Relying on *United States v. Jacobsen, supra*, the court held that because the government agent merely had repeated what the airline's employees had already done, there was no Fourth Amendment violation. Thus, "[i]t was virtually certain that the government's search would not reveal anything more than the government agent had already been told by the carrier." *Id.* at 815. As in *Jacobsen*, the owner's privacy interest "had been eliminated because the package was unsealed and had been inspected by the carrier's employees." *Ibid.*

United States v. Bomengo, 580 *F.*2d 173 (5th Cir.1978), *cert. denied*, 439 *U.S.* 1117, 99 *S.Ct.* 1022, 59 *L.Ed.*2d 75

(1979), decided before *Jacobsen*, involved the discovery of illegal firearms in a closet in an apartment. The discovery was made by the chief engineer of an apartment complex when he entered the apartment to investigate water leakage. Entry was made only after unsuccessful attempts to locate the tenant. After discovering the firearms, apartment security contacted the police. A detective arrived, entered the apartment at the security director's invitation, and observed the firearms. The court held that "a police view subsequent to a search conducted by private citizens does not constitute a 'search' within the meaning of the Fourth Amendment so long as the view is *confined to the scope and product of the initial search*." *Id.* at 175 (emphasis added).

The underscored language in the quotation from Bomengo is the key to the inapplicability of third party intervention to the present case. In *Jacobsen, Moore, Walsh* and *Bomengo*, the breach of privacy by the private searches revealed objects, some of which were illegal. The government agents saw the same objects. Thus, the inspections by the government agents did not expand the scope or the product of the initial private searches. However, where the government expands the private search, the third-party intervention exception no longer applies to the fruits of the expanded search.

Walter v. United States, 447 *U.S.* 649, 100 *S.Ct.* 2395, 65 *L.Ed.*2d 410 (1980), is an exemplar of this distinction. That case involved the erroneous delivery by a shipping company of twelve cartons to "L'Eggs Products, Inc." instead of "Leggs, Inc." Employees of L'Eggs Products opened the boxes and found film canisters, the labeling of which indicated that they contained scenes of homosexual activity. The employees did

not screen the films or otherwise view their content. L'Eggs Products informed the Federal Bureau of Investigation, whose agents picked up the cartons and viewed the films utilizing a projector. A majority of the Court held that the viewing of the films without a warrant was a search which violated the Fourth Amendment.

In *Walter*, Justice Stevens distinguished the third-party intervention cases on the ground that the FBI's screening of the films was a separate search which had expanded the scope of the private search. Justice Stevens stated:

> The projection of the films was a significant expansion of the search that had been conducted previously by a private party and therefore must be characterized as a separate search. That separate search was not supported by any exigency, or by a warrant even though one could have easily been obtained.
>
> . . .
>
> The fact that the cartons were unexpectedly opened by a third party before the shipment was delivered to its intended consignee does not alter the consignor's legitimate expectation of privacy. The private search merely frustrated that expectation in part. It did not simply strip the remaining unfrustrated portion of that expectation of all Fourth Amendment protection. Since the additional search conducted by the FBI -- the screening of the

films -- was not supported by any justification, it violated that Amendment.

[*Id.* at 657-59, 100 *S.Ct.* at ___, 65 *L.Ed.*2d at 418-419.]

In the present case, the police were not invited to view specific, immutable objects that the tenant-informant had reduced to possession. The police were invited to participate in the surveillance of a basement and any activities which might occur in that basement during the police surveillance. Because no one could predict with certainty what the police would see, unlike the *Jacobsen* line of cases, each moment of surveillance was a new invasion of privacy. The basement activities to be seen from the tenant-informant's vantage point could have included licit as well as illicit behavior, activities of other members of the suspect's family and even private intimate behavior.

Beyond the third-party intervention cases, there is a line of cases involving aural and visual surveillance by law enforcement authorities which tends to support the State's position in the present case. In those cases the police were engaged in surveillance from positions where they had a right to be.

United States v. Whaley, 779 *F.*2d 585 (11th Cir.1986), *cert. denied*, 479 *U.S.* 1055, 107 *S.Ct.* 931, 93 *L.Ed.*2d 982 (1987), is one of those cases. In that case the government had reason to believe that equipment and chemicals capable of producing synthetic cocaine had been delivered to defendant's home. Defendant, a medical doctor, lived on a three-acre lot

adjacent to a canal. However, defendant's neighbor gave DEA agents permission to base their surveillance on his property which was across the canal from defendant's house. From their vantage point the agents were able to look into defendant's basement through large, uncurtained windows. Based on their observations the agents obtained a search warrant. The court of appeals affirmed the denial of defendant's suppression motion because defendant's expectation of privacy was not reasonable in light of the fact that defendant's basement activities "could be viewed with the naked eye from a position on the canal or on neighboring property adjoining the canal." *Id.* at 590.

Similarly, in *People v. Wright*, 242 *N.E.*2d 448 (Ill. 1968),*cert. denied*, 395 *U.S.* 933, 89 *S.Ct.* 1993, 23 *L.Ed.*2d 448 (1969), the court affirmed denial of a motion to suppress. There, the officer, standing on a right of way belonging to a public transit authority, was one to three feet from the rear windows of a house in which illicit gambling activities were being conducted. Based on what he saw through an opening in the window curtains, as well as on the conversations he heard while at the window, the officer had probable cause to believe that a crime was being committed. See also *Commonwealth v. Busfield*, 363 *A.*2d 1227 (Pa. Sup. Ct. 1976) (no reasonable expectation of privacy where police, located on neighboring property, could see into defendant's house through sheer curtains covering kitchen window); *Commonwealth v. Hernley*, 263 *A.*2d 904 (Pa. Sup. Ct. 1970)(not an unlawful search for FBI to use binoculars from a ladder situated on railroad tracks to look inside commercial building through windows located high off the ground),*cert. denied*, 401 *U.S.* 914, 91 *S.Ct.* 886, 27 *L.Ed.*2d 813 (1971).

Aural surveillance has been upheld in similar circumstances. For example, in *United States v. Mankani*, 738 *F.*2d 538 (2d Cir.1984), a DEA agent occupying a hotel room adjacent to defendant's was able to hear conversations in defendant's room through the use of a small pre-existing hole in the wall between the rooms. Apparently the hole resulted from changes the hotel had made in its room telephone service. The court determined that there was a diminished expectation of privacy in a hotel room, and concluded:

> In short, it is the transitory nature of such places, commonly understood as such, that diminishes a person's justifiable expectation of privacy in them. Since a hotel room is exposed to others, it is unlike a "house," i.e., a place where one lives. Therefore, there is an accepted loss of privacy when one occupies a public place, somewhat akin to a conversation in the street, and the intervention of a human ear in those surroundings is the kind of intrusion one should anticipate. A number of courts, including our own, have concluded that the intrusion of a human ear in a similar circumstances is not an unlawful "seizure" of a conversation in a hotel or motel room. *See e.g., United States v. Agapito, supra; United States v. Sin Nagh Fong*, 490 *F.*2d 527, 530 (9th CiR.),*cert. denied*, 417 *U.S.* 916, 94 *S.Ct.* 2618, 41 *L.Ed.*2d 220 (1974); *United States v. Ortega, supra; Ponce v. Craven*, 409 *F.*2d 621, 625 (9th Cir.1969).

[*Id.* at 544.]

See also *State v. Benton*, 536 *A.*2d 572, 575 (Conn. 1988) ("Conversations . . . in a tone audible to the unaided ear of a person located in a place where that person has a right to be, and where a person can be expected to be, are conversations knowingly exposed to the public.").

Where, however, a suspect had engaged in unusual efforts to protect his privacy, or the police had engaged in unusual efforts to pierce the veil of privacy, it has been held that constitutional guarantees against unreasonable searches and seizures were violated. In *Commonwealth v. Panetti*, 547 *N.E.*2d 46 (Mass. 1989), the court held that the police violated the Massachusetts Constitution when an officer, with the landlord's permission, entered a crawl space under defendant's first floor apartment. From that vantage point, the officer overheard conversations relating to the sale of drugs. The court grounded its ruling on a determination that defendant had a reasonable expectation that no one would be in the crawl space. The court was satisfied that the crawl space was an area "where neither neighbors nor the public would ordinarily be expected to be." *Id.* at 48.

In *Lorenzana v. Super. Ct. of Los Angeles Cty.*, 511 *P.*2d 33 (Cal. 1973), a policeman positioned himself on a grassy area adjacent to defendant's house, an area to which the public had not been invited, and peeked through a two-inch gap between the bottom of a drawn shade and the windowsill. The California Supreme Court, after reviewing relevant case law, ordered that the evidence generated by the surveillance be suppressed because the observations were made from a position

to which neither the police or the public had been invited, expressly or impliedly.

> The fact that apertures existed in the window, so that an unlawfully intruding individual so motivated could spy into the residence, does not dispel the reasonableness of the occupants' expectation of privacy. To the contrary, the facts of this case demonstrate that by drawing the window shade petitioner Lorenzana exhibited a reasonable expectation to be free from surveillance conducted from a vantage point in the surrounding property not open to the public or common use. Surely our state and federal Constitutions and the cases interpreting them foreclose a regression into an Orwellian society in which a citizen, in order to preserve a modicum of privacy, would be compelled to encase himself in a light-tight, air-proof box. The shadow of 1984 has fortunately not yet fallen upon us.
>
> [*Id.* at 41 (citations omitted).]

See also Pate v. Mun. Ct. for Modesto Judicial District, 89 *Cal. Rptr.*893 (Cal. Ct. App. 1970) (police violated Fourth Amendment by climbing trellis and peeking through a one-inch opening in drawn drapes of motel room).

In the present case, defendant had gone to unusual lengths to protect the privacy of his activities. He conducted those activities in his basement, by definition a place affording

only limited opportunities for scrutiny by unauthorized persons. Defendant enhanced the basement's inherent privacy by shielding its windows. Unknown to defendant, however, there were chinks in his wall of privacy which permitted a neighbor to place defendant's basement under surveillance. The neighbor's surveillance did not violate the Fourth Amendment because it was private action.

The police surveillance was government action, thereby implicating constitutional guarantees against unreasonable searches. However, the police were lawfully in the adjoining basement, having been invited to that vantage point by defendant's neighbor. Thus, this case does not fit neatly into any particular category for Fourth Amendment analysis.

Utilizing Fourth Amendment cases for guidance, *State v. Hempele*, 120 *N.J.* 182, 197-98 (1990), however, I am persuaded that the police surveillance in this case was an unlawful search under Article I, paragraph 7 of the New Jersey Constitution which in some circumstances affords greater protection against government searches than the Fourth Amendment. *Id.* at 195; *State v. Novembrino*, 105 *N.J.* 95, 145 (1987); *State v. Hunt*, 91 *N.J.* 338 (1982).

"[T]he New Jersey Constitution requires only that an expectation of privacy be reasonable." *Hempele*, *supra*, 120 *N.J.* at 200. "In determining the reasonableness of an expectation of privacy . . . we start from the premise that '[e]xpectations of privacy are established by general social norms.'" *Ibid.* (quoting *Robbins v. California*, 453 *U.S.* 420, 428, 101 *S.Ct.* 2841, 2847, 69 *L.Ed.*2d 744, 751 (1981), overruled on other grounds, *United States v. Ross*, 456 *U.S.*

798, 102 *S.Ct.* 2157, 72 *L.Ed.* 572 (1982)). One of the factors relied on in determining the reasonableness of an expectation of privacy is "our societal understanding that certain areas deserve the most scrupulous protection from government invasion." *Oliver v. United States*, 466 *U.S.* 170, 178, 104 *S.Ct.* 1735, ___, 80 *L.Ed.*2d 214, 224 (1984). One of those areas is the home, which has been protected by "the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic." *Payton v. New York*, 445 *U.S.* 573, 601, 100 *S.Ct.* 1371, ___, 63 *L.Ed.*2d 639, 660 (1980). It has been said that the protection of the home is at "the very core" of constitutional protection against "unreasonable governmental intrusion." *Silverman v. United States*, 365 *U.S.* 505, 511, 81 *S.Ct.* 679, 682, 5 *L.Ed.*2d 734, 739 (1961). See *State v. Hutchins*, 116 *N.J.* 457, 463 (1989); *State v. Bolte*, 115 *N.J.* 579, 583-85, 597 (1989)(hot pursuit of person in connection with motor vehicle and disorderly persons offenses did not justify warrantless entry into suspect's home to effect arrest),*cert. denied*, 493 *U.S.* 936, 110 *S.Ct.* 330, 107 *L.Ed.*2d 320 (1989).

The walls of a home ordinarily conceal activities within the house from plain view except to the extent that those activities readily may be viewed by members of the public through unprotected openings as in *Whaley*, *supra*, *Wright*, *supra*, *Busfield*, *supra*, and *Hernley*, *supra*. The police surveillance in the present case was an egregious breach of the privacy and security afforded by the home to its occupants and violated our societal expectations regarding appropriate conduct by our fellow citizens as well as by the police. It was chillingly evocative of surveillance techniques favored by governments under which rights of individual privacy have a low priority. I

conclude, therefore, that defendant's expectation of privacy in his basement was reasonable, despite the neighbor's ability to survey surreptitiously the basement's interior.

I am also persuaded that the neighbor's surveillance opportunity did not nullify the warrant requirement. *Cf. Chapman v. United States*, 365 *U.S.* 610, 81 *S.Ct.* 776, 5 *L.Ed.*2d 828 (1961)(landlord's request that police enter locked tenant-house to investigate suspected illegal still, did not vitiate warrant requirement). The fact that the basement was not perfectly secure is not dispositive. See *Hempele*, *supra*, 120 *N.J.* at 204-06. "Unreasonable police searches are often impermissible in areas accessible to other third parties." *Id.* at 204. *Cf. O'Connor v. Ortega*, 480 *U.S.* 709, 718, 107 *S.Ct.* 1492, ___, 94 *L.Ed.*2d 714, 723-24 (1987)(public employee had a reasonable expectation of privacy in his office, desk and file cabinets). Our Supreme Court has recognized that "a person's expectation of privacy can differ in regard to different classes of people." *Hempele*, *supra*, 120 *N.J.* at 205. Thus, despite the potential that a neighbor or other person might sort through or otherwise examine a person's garbage, the police may not do so without a warrant. "There is a difference between a homeless person scavenging for food and clothes, and an officer of the State scrutinizing the contents of a garbage bag for incriminating materials." *Id.* at 205-06.

I rejected the State's reliance on the plain view doctrine. *Texas and Brown*, 460 *U.S.* 1730, 103 *S.Ct.* 1535, 75 *L.Ed.*2d 502 (1983); *State v. Bruzzese*, 94 *N.J.* 210 (1983),*cert. denied*, 465 *U.S.* 1030, 104 *S.Ct.* 1295, 79 *L.Ed.*2d 695 (1984). Although the police had the right to be in the informant's basement, the issue is whether the police had the legal right,

without a warrant, to breach, literally and figuratively, defendant's privacy wall. But *cf. State v. Smith*, 37 *N.J.* 481 (1962),*cert. denied*, 374 *U.S.* 835, 83 *S.Ct.* 1879, 10 *L.Ed.*2d 1055 (1963), in which the Court held that the police did not violate the Fourth Amendment when officers peered into an apartment through either a keyhole or a crack in the door while they were standing in a common hallway. Though valuable as guidance, *Smith* is not binding because the Court was applying the Federal Constitution, not the New Jersey Constitution.[1] Moreover, there is a different expectation of privacy regarding the security afforded by a door accessible from a common hallway and the security afforded by a basement wall.

I conclude that the police surveillance of defendant's basement violated a legitimate and reasonable expectation of privacy, one which society will recognize as valid, and, therefore, was a search requiring a warrant.[2] Accordingly, the fruits of the search should have been suppressed. Those fruits include defendants' activities in the basement observed by the police as well as the aerosol can and its contents and the tin foil

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[1]I also note that while *Smith* was pending in the New Jersey Supreme Court, the United States Supreme Court decided *Mapp v. Ohio*, 367 *U.S.* 643, 81 *S.Ct.* 1684, 6 *L.Ed.*2d 1081 (1961), thereby extending the exclusionary rule to state courts.

[2]In addition to being constitutionally required, a warrant issued by a neutral judicial officer would have permitted judicial supervision of the surveillance. For example, surveillance times may have been limited to the hours when, according to the informant, drug activity in the basement was most likely to occur. *R.* 3:5-3(a). The duration of the warrant could have been limited to less than the ten days permitted by rule. *R.* 3:5-5(a). Judicial supervision of covert surveillance is also important because, unlike a physical search, the subject may never know that the police had violated the privacy of his home.

packages found in Louis [sic] Saez's hand when the officers stopped the Toyota. I would reverse the convictions and remand the case for further proceedings.

Supreme Court, U.S.
FILED
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(2)

No. 94-1885

In The

Supreme Court of the United States

October Term, 1994

STATE OF NEW JERSEY,

Petitioner,

vs.

EDDIE SAEZ, ORLANDO NAVARRO and LUIS SAEZ,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION FOR RESPONDENT EDDIE SAEZ

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QUESTION PRESENTED

Whether this Court has jurisdiction to review a State Supreme Court decision appropriately based on its interpretation of state constitutional law.

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On Petition for Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION FOR RESPONDENT EDDIE SAEZ

The respondent, Eddie Saez, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by petitioner, State of New Jersey.

OPINIONS BELOW

The Superior Court of New Jersey, Appellate Division, affirmed the trial court's denial of a Motion to Suppress Evidence seized without a search warrant. The court's opinion is reported at 268 N.J. Super. 250, 633 A.2d 551 (App. Div. 1993) and is reproduced in the Appendix to State of New Jersey's Petition for Certiorari (Pet. App. B, 6a-44a).

The Supreme Court of New Jersey reversed the decision of the Superior Court of New Jersey, Appellate Division and remanded for new trial. The court's opinion is reported at 139 N.J. 279, 653 A.2d 1130 (1995) and is reproduced in the Appendix to State of New Jersey's Petition for Certiorari (Pet. App. A, 1a-5a).

STATEMENT OF JURISDICTION

Petitioner invokes 28 U.S.C. § 1257(a) as the basis for review of the judgment of the New Jersey Supreme Court. Petitioner asserts that the New Jersey Supreme Court's opinion relies on that portion of the Superior Court of New Jersey, Appellate Division dissenting opinion that invokes only the Fourth Amendment and federal case law. Petitioner further asserts that the remainder of the same dissenting opinion speaks to possible exceptions to the warrant requirement as alternatives to the third-party intervention exception.

All of the above is a mischaracterization of the state court's opinion. There is no portion of the state court opinion which invokes the Fourth Amendment as the basis for the decision; to the contrary it specifically relies on Article I, paragraph 7 of the New Jersey Constitution. (Pet. App. B, 40a). The state court opinion also clearly states that federal cases are referred to merely for guidance. (Pet. App. B, 40a, 43a). The remainder of the decision discusses respondent's expectation of privacy.

Since the state court's decision is based squarely on its interpretation of New Jersey constitutional law, this Court lacks jurisdiction to review this matter.

STATEMENT OF THE CASE

The relevant facts of this case were elicited at the suppression hearing held before the state trial court. They are also set fort in the opinion of the Superior Court of New Jersey, Appellate Division (Pet. App. B, 11a-15a) and are as follows:

Investigators Cassidy and West, members of the Monmouth County Narcotics Strike Force, received information from a confidential citizen informant that alluded to narcotic activity in the basement of an adjoining residence. The investigators met with the informant, who at the time lived at 1111A Fifth Avenue in Asbury Park, New Jersey. The informant related that by looking through the wall separating her basement from 1111B Fifth Avenue, a separate residence, she could see Hispanic males doing what she believed to be cutting and packaging narcotics. Investigator Cassidy attempted to corroborate the information by taking a "ride by" check of the residence in question and running background checks of the residence occupants, in particular Eddie Saez.

Based upon the information received from the informant, the Monmouth County Prosecutor's Office decided to conduct a surveillance of 1111B Fifth Avenue by securing Investigator Cassidy in the basement of the informant's home. This would allow him to see through the basement wall which separated the two residences.

On May 17, 1990, Investigator Cassidy arrived at the informant's address at approximately 5:40 p.m. Cassidy immediately started his surveillance by peering through the small holes and cracks in the basement wall, at times utilizing pieces of a broken mirror. By doing so, he was able to observe narcotic activity involving a total of four Hispanic males. Investigator Cassidy kept in radio contact with Sergeant Brian Rubino and advised him of his observations.

After observing these activities for approximately forty-five minutes, Cassidy radioed to Sergeant Rubino that two of them were leaving the residence in a black Toyota. Officers stopped the motor vehicle occupied by Luis Saez and Orlando Navarro, who were placed under arrest at that time. Eddie Saez was not arrested on that evening, apparently so further observations of his conduct could be made from the basement of 1111A Fifth Avenue. (*See* Pet. App. B, 15a).

A search warrant was issued on May 18, 1990 but was not executed and was permitted to lapse. Instead, Investigator Cassidy continued to conduct observations in the same manner with negative results. A second search warrant was issued on May 29, 1990 and was executed on June 3, 1990 resulting in the seizure of narcotic paraphernalia. Eddie Saez was arrested at that time.

REASONS FOR DENYING THE WRIT

THE STATE SUPREME COURT CORRECTLY HELD THAT THE GOVERNMENT'S CONDUCT WAS AN UNLAWFUL SEARCH UNDER NEW JERSEY CONSTITUTIONAL LAW.

In an effort to invoke this Court's jurisdiction, the petitioners attempt to create a conflict between the state court's decision and prior decisions of this Court, where none exists. The state court was exercising its right to interpret portions of its own state constitution and to decide novel issues under the same. Petitioner is correct that the narrow issue presented here has not been decided by this Court under federal constitutional principles, yet petitioner attempts to create a conflict between state and federal law where none exists.

A. This Court Lacks Jurisdiction To Decide This Matter Since The State Court Based Its Decision Squarely On State Constitutional Law.

In an effort to obtain review here, the petitioners have mischaracterized the nature of the state court's decision, claiming that it is based on interpretations of federal constitutional law. To the contrary, the state court's decision rests squarely on New Jersey constitutional law.

Petitioners claim that the New Jersey Supreme Court's decision does not provide a plain statement of the existence of independent and adequate state grounds upon which the decision rests, but instead expressly relies on that portion of the dissenting opinion of the Superior Court of New Jersey Appellate Division, which invokes only the Fourth Amendment to the United States Constitution to invalidate the warrantless search. This is a complete mischaracterization of the state court's decision. To begin with, the New Jersey Supreme Court refers to and relies on the entire dissenting opinion of the Superior Court, Appellate Division, and not any specific portion. But more importantly, there is no portion of that dissenting opinion which invokes only the Fourth Amendment as a basis for the decision.

The dissenting opinion is clearly based on New Jersey constitutional law, as is evidenced by the following excerpt:

> Utilizing Fourth Amendment cases for guidance, *State v. Hempele*, 120 N.J. 182, 197-98 (1990), however, I am persuaded that the police surveillance in this case was an unlawful search under Article I, paragraph 7 of the New Jersey Constitution which in some circumstances affords greater protection against government searches than the Fourth

> Amendment. *Id.* at 195; *State v. Novembrino,* 105 N.J. 95, 145 (19878); *State v. Hunt,* 91 N.J. 338 (1982).

268 N.J. Super 250, 276 (App. Div. 1993). (Pet. App. B, 40a).

The fact that the state court's decision was based on New Jersey constitutional law could not be any clearer.

Although not as direct, further evidence that the state court's decision rests entirely on state law is found later in the same dissenting opinion:

> I reject the State's reliance on the plain view doctrine. *Texas v. Brown,* 460 U.S. 730, 103 S. Ct. 1535, 75 L. Ed. 2d 502 (1983); *State v. Bruzzese,* 94 N.J. 210 (1983), *cert. denied,* 465 U.S. 1030, 104 S. Ct. 1295, 79 L. Ed. 695 (1984). Although the police had the right to be in the informant's basement, the issue is whether the police had the legal right, without a warrant, to breach, literally and figuratively, defendant's privacy wall. *But cf. State v. Smith,* 37 N.J. 481 (1962), *cert. denied,* 374 U.S. 835, 83 S. Ct. 1879, 10 L. Ed. 2d 1055 (1963), in which the Court held that the police did not violate the Fourth Amendment when officers peered into an apartment through either a keyhole or a crack in the door while they were standing in a common hallway. *Though valuable as guidance, Smith is not binding because the Court was applying the Federal Constitution, not the New Jersey Constitution.*

> Moreover, there is a different expectation of privacy regarding the security afforded by a door accessible from a common hallway and the security afforded by a basement wall.

(Emphasis added). 268 N.J. Super. at 278 (Pet. App. B, 43a). In light of the above two quotes from the dissenting opinion of the Superior Court of New Jersey, Appellate Division, it is clear that the state court's decision rests squarely on state constitutional law.

In *Arizona v. Evans*, 514 U.S. __, __, 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995), this Court reiterated the standards for determining its own jurisdiction previously stated in *Michigan v. Long*, 463 U.S. 1032, 103 S. Ct. 3469 (1983) holding:

> When "a State Court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible State law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the State Court decided the case the way it did because it believed that federal law required it to do so."

Arizona v. Evans, 131 L. Ed. 2d at 41 *citing Michigan v. Long*, 463 U.S. 1032, 1040-1041.

In finding that there was jurisdiction, this Court held in *Evans* that "the Arizona Supreme Court's decision to suppress the evidence was based squarely upon its interpretation of federal law" and that it did not "offer a plain statement that its references to federal law were being used only for the purpose of guidance and did not themselves compel the result that it reached." *Evans, supra*, at 43 *citing Long, supra*, at 1041.

In this matter, the state court opinion provided a clear and plain statement that its decision was based on state constitutional law and that any references to federal cases were merely for the purpose of guidance. Any assertion by the petitioner to the contrary is meritless and should be rejected.

B. The State Court Correctly Held That The Police Officer's Action Was A Significant Expansion Of The Prior Private Search And Was Therefore An Unlawful Search Under Article I, Paragraph 7 Of The New Jersey Constitution.

Both the majority and dissenting opinions of the Superior Court of New Jersey, Appellate Division found that respondents had a legitimate and reasonable expectation of privacy. The majority opinion of the Appellate Division held that the warrantless search was nevertheless valid under the third party intervention doctrine created by *United States v. Jacobsen*, 466 U.S. 109, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984). In reviewing this decision, the New Jersey Supreme Court held that the "extended and continuous police surveillance [w]as a significant expansion of the informant's prior observation of the activities conducted in the adjacent basement." (Pet. App. A, 2a-3a).

The crux of the decision is found in the language of the Superior Court of New Jersey, Appellate Division dissenting opinion:

> In the present case, the police were not invited to view specific, immutable objects that the tenant-informant had reduced to possession. The police were invited to participate in the surveillance of a basement and any activities which might occur in that basement during the police surveillance. Because no one could predict with certainty what the police would see, unlike the

> *Jacobsen* line of cases, each moment of surveillance was a new invasion of privacy. The basement activities to be seen from the tenant-informant's vantage point could have included licit as well as illicit behavior, activities of other members of the suspect's family and even private intimate behavior.

(Pet. App. B, 35a).

Petitioner asserts that the New Jersey state courts have misconstrued this Courts opinions in *United States v. Jacobsen,* 466 U.S. 109 (1984) and *Walter v. United States,* 447 U.S. 648 (1980), by limiting the third-party intervention doctrine to those instances where the private party, and subsequently the police, viewed only those items reduced to tangible, immutable contraband. Clearly this is not the case, as the New Jersey Supreme Court also stated, "we do not imply that the third party intervention exception applies only when the informant previously has reduced to possession the objects viewed by the law enforcement officials . . .". (Pet. App. A, 2a-3a).

Petitioner claims that the state courts misconstrued *Walter v. United States* by focusing on the character of the object of the search rather than the nature of the officer's conduct. To the contrary, as in *Walter,* the state courts focused exactly on the officer's conduct and the manner in which the officer significantly expanded the scope of the prior private search. Particularly in this matter it seems obvious that the officer intended to expand the search and perhaps view new items or activity as evidenced by the duration of his surveillance and the fact that he returned to conduct surveillance on subsequent occasions. The state courts appropriately applied the principles of the third-party intervention doctrine in finding that the private search was expanded by law enforcement and was unlawful under New Jersey constitutional law.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

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No. 94-1885

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1994

STATE OF NEW JERSEY,

Petitioner,

v.

EDDIE SAEZ, ORLANDO NAVARRO AND LUIS SAEZ,

Respondents.

On Petition for a Writ of Certiorari
To The Supreme Court of New Jersey

RESPONDENTS' BRIEF IN OPPOSITION

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18 pp

QUESTIONS PRESENTED

1. Whether this Court should review opinions of the New Jersey state courts which were plainly decided on adequate and independent state grounds utilizing this Court's decisions in United States v. Jacobsen, 466 U.S. 109, 104 S.Ct. 1652 (1984) and Walter v. United States, 447 U.S. 649, 100 S.Ct. 2395 (1980) for guidance only?

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STATE OF NEW JERSEY,

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Orlando Navarro and Luis Saez, respectfully request that this Court deny the petition for a writ of certiorari, seeking review of the opinion of the New Jersey Supreme Court entered in this case on February 23, 1995.

OPINIONS BELOW

The opinion of the Appellate Division of the Superior Court of the State of New Jersey is reported at 268 N.J. Super. 250, 633 A.2d 551 (App. Div. 1993), and is appended to petitioner's Petition for Certiorari as Appendix B, pp. 6a-44a.

The opinion of the Supreme Court of New Jersey is reported at 139 N.J. 279, 653 A.2d 1130 (1995), and is appended to the petition as Appendix A, p. 1a-5a.[1]

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[1] References to the appendix to the petition for certiorari in this brief will adhere to the form used in the petition itself ("App. ___"). References to the petition itself will be cited as "P___" with the appropriate page number.

JURISDICTION

Respondents submit that this Court lacks jurisdiction under 28 U.S.C. sec. 1257(a), to review any portion of the judgment of the New Jersey Supreme Court. That portion of the New Jersey Supreme Court's opinion which holds that the third party intervention exception to the warrant requirement is not applicable to the facts in the instant case, relies upon the dissenting opinion of the Appellate Division of the Superior Court of New Jersey. App. A, pp. 2a-3a. The dissenting opinion explicitly states that in rejecting the third party intervention doctrine in the instant case, it is utilizing the federal and out-of-state cases cited as "examples," App. B, pp. 31a-35a, ultimately concluding that "this case does not fit neatly into any particular category for Fourth Amendment analysis." App. B, p. 41a. The dissenting judge then specifically states that the police surveillance in the instant case was an unlawful search under the state constitution:

> Utilizing Fourth Amendment cases for guidance, State v. Hempele, 120 N.J. 182, 197-198 (1990), however, I am persuaded that the police surveillance in this case was an unlawful search under Article I, paragraph 7 of the New Jersey Constitution which in some circumstances affords greater protection against government searches that the Fourth Amendment. Id. at 195; State v. Novembrino, 105 N.J. 95, 145 (1987); State v. Hunt, 91 N.J. 338 (1982).

App. B, p.40a. Therefore, because the dissenting opinion of the state appellate court holding the third party intervention doctrine inapplicable to the warrantless search of respondents' premises, upon which the state supreme court expressly relies, plainly rests

upon an adequate and independent state ground, it is not subject to review by this Court. See Arizona v. Evans, ___ U.S. ___, ___, 115 S.Ct. 1185, 1189-90 (1995); Michigan v. Long, 463 U.S. 1032, 1040-41, 103 S.Ct. 3469, 3476-77 (1983).

In the event this Court does not agree that it lacks jurisdiction to review the portion of the judgments below applying the third party intervention doctrine, respondents submit, and petitioner concedes, P 2-3, that several related questions were noted but not addressed by the New Jersey Supreme Court and are thus not subject to review by this Court. Both the majority and dissenting opinions of the Appellate Division agreed that the police surveillance of the respondents' basement constituted a "search" within the meaning of Article I, paragraph 7 of the New Jersey Constitution, see State v. Hempele, supra, and that the warrantless search was not justified by the plain view exception to the warrant requirement.

The New Jersey Supreme Court declined to address those issues since they were not properly before the court on respondents' appeal as of right, pursuant to N.J. Court R. 2:2-1(a)(2), on the basis of the dissent in the Appellate Division. Similarly, any issue dealing with whether the governmental action in the instant case constituted a "search" for constitutional purposes, or the plain view exception, is not subject to review by this Court, since the state court decision plainly rests upon an adequate and independent state ground. See Arizona v. Evans, ___ U.S. at ___,

115 S.Ct. at 1189-90; Michigan v. Long, 463 U.S. at 1040-41, 103 S.Ct. at 3476-77.

STATEMENT OF THE CASE

Respondents adopt the statement of the case contained in the petition for certiorari except to add the following: Contrary to the petitioner's assertion that Investigator Cassidy "did nothing to create the gaps and holes in the wall or to make them more accessible," P 4, in fact, Investigator Cassidy testified at the suppression hearing that he had to hold a piece of broken mirror he had found in the basement over his head to see through a gap located above the furnace in order to make some of his observations. (App. B, at p. 13a) Cassidy further admitted that it would not have been possible to conduct a surveillance of the basement of the residence from outside of the building because the basement windows had been deliberately obscured, having been painted over and covered with towels or sheets. (App. B, at p. 13a)

REASONS FOR DENYING CERTIORARI

POINT I

THE PETITION DOES NOT PRESENT A SUBSTANTIAL QUESTION BECAUSE THE STATE COURTS CORRECTLY APPLIED THIS COURT'S PRIOR DECISIONS IN UNITED STATES V. JACOBSEN AND WALTER V. UNITED STATES IN FINDING THAT THE WARRANTLESS SEARCH OF RESPONDENTS' RESIDENCE WAS NOT JUSTIFIED UNDER THE THIRD PARTY INTERVENTION DOCTRINE.

If this Court disagrees with respondents' jurisdictional argument, supra, and decides that the opinions in question are subject to the Court's jurisdiction, respondents submit that certiorari should be denied because no substantial question is presented in the petition. The opinion of the New Jersey Supreme Court and the dissenting opinion of the appellate court upon which it relies, are no more than a routine application of the well-established parameters of the "third party intervention" doctrine as enunciated by this Court in United States v. Jacobsen, 466 U.S. 109, 104 S.Ct. 1652 (1984) and Walter v. United States, 447 U.S. 649, 100 S.Ct. 2395 (1980).

Petitioner has requested that certiorari be granted in this matter because, it alleges, the state courts' refusal to extend the third party intervention doctrine to searches involving "ongoing criminal activity" conflicts with the decisions of this Court. P 9. Respondents submit that this Court should deny the petition for certiorari because the state courts correctly applied the third party intervention doctrine as enunciated in United States v. Jacobsen, 466 U.S. 109, 104 S.Ct. 1652 (1984) and Walter v. United States, 447 U.S. 649, 100 S.Ct. 2395 (1980), to the facts in the

instant case. Moreover, contrary to petitioner's expansive declaration, the state supreme court specifically held:

> Although we do not imply that the third-party intervention exception applies only when the informant previously has reduced to possession the objects viewed by law-enforcement officials, we are generally in accord with the dissenting opinion's analysis that described the extended and continuous police surveillance as a significant expansion of the informant's prior observation of the activities conducted in the adjacent basement.

App. A, p. 2a-3a. (emphasis added) Thus the court held that under the facts of the instant case, the third-party intervention doctrine was not available to justify the warrantless search of respondents' residence. App. A, p. 3a.

Respondents urge that even a cursory reading of the petition for certiorari evidences a vain attempt to create some justification for a search that was illegal at its inception because law enforcement authorities inexplicably failed to secure the required warrant prior to conducting the surveillance of respondents' basement. The misapplication of the third party intervention requirement to the facts of the instant search by the majority of the state appellate court was merely a contrivance to uphold the illegal search, and the dissenting opinion relied upon by the state supreme court in rejecting the majority's error, correctly applied this Court's decisions in Jacobsen, supra, Walter, supra, and their progeny.

As explained by this Court in Jacobsen, the Fourth Amendment's protection against unreasonable searches and seizures proscribes only governmental action. The Fourth Amendment is wholly

inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with participation or knowledge of any governmental official. Id. at 112, 104 S.Ct. at 1656. The Jacobsen Court concluded that the search of a package which Federal Express employees had damaged and then examined did not violate the Fourth Amendment because that invasion of the defendant's privacy was occasioned by private persons. The subsequent search conducted by government agents, at the request of the Federal Express employees therefore, did not constitute a "search" within the meaning of the Fourth Amendment, because it did not infringe upon a legitimate expectation of privacy, since a prior invasion of privacy by the Federal Express employees had already occurred. The Fourth Amendment was therefore not implicated because the government agents had not expanded the scope of the initial private invasion. Id. at 120, 104 S.Ct. at 1660.

The Jacobsen Court distinguished the facts of that case from another Supreme Court case in which evidence was suppressed because it was found that the government agents did in fact exceed the scope of the initial private invasion. In Walter v. United States, supra, a majority of the Court concluded that a search conducted by the FBI expanded the scope of the initial private invasion and therefore required a warrant. In Walter, employees of a company opened boxes which had erroneously been shipped to them and discovered rolls of motion picture films, the labeling of which indicated that they contained scenes of homosexual activity. The

employees turned the carton over to the FBI without screening the films. Later, without obtaining a warrant, FBI agents obtained a projector and viewed the films. A majority of the Court agreed that the appropriate analysis of a governmental search which follows on the heels of a private search must be tested by the scope of the antecedent private search. Id. at 656, 100 S.Ct. at 2400. Justice Stevens explained:

> If a properly authorized official search is limited by the particular terms of its authorization, at least the same kind of strict limitation must be applied to any official use of a private party's invasion of another person's privacy. Even though some circumstances--for example, if the results of the private search are in plain view when materials are turned over to the Government--may justify the Government's reexamination of the materials, surely the Government may not exceed the scope of the private search unless it has the right to make an independent search. In this case, the private party had not actually viewed the films. Prior to the Government screening, one could only draw inferences about what was on the films. The projection of the films was a significant expansion of the search that had been conducted previously by a private party and therefore must be characterized as a separate search. That separate search was not supported by any exigency, or by a warrant even though one could have easily been obtained.

Id. at 657, 100 S.Ct. at 2401.

The Jacobsen majority agreed with Walter, finding that "[w]hen the first federal agent on the scene initially saw the package, he knew it contained nothing of significance except a tube containing plastic bags and, ultimately, white powder." Moreover, "the removal of the plastic bags from the tube and the agent's visual inspection of their contents enabled the agent to learn nothing

that had not previously been learned during the private search." Jacobsen, 466 U.S. at 118-119, 104 S.Ct. at 1659-1660. The Court similarly concluded that the chemical test of the powder did not constitute an unreasonable "seizure" of the package because

> [t]he agents had already learned a great deal about the contents of the package from the Federal Express employees, all of which was consistent with what they could see. The package itself, which had previously been opened, remained unsealed, and the Federal Express employees had invited the agents to examine its contents. Under these circumstances, the package could no longer support any expectation of privacy; it was just like a balloon "the distinctive character [of which] spoke volumes as to its contents--particularly to the trained eye of the officer," Texas v. Brown, 460 U.S. 730, 743, 103 S.Ct. 1535, 1544, 75 L.Ed.2d 502 (1983)(plurality opinion). (other citations omitted).

Id. at 119, 104 S.Ct. at 1660.

In the instant case, the tenant-informant told Investigator Cassidy that she observed people conducting activities in the basement adjoining that of respondents on several occasions, at least once a week, during the course of the previous two months. Although the tenant-informant stated that this activity usually took place at least once a week, there is no indication that it took place on the same day of the week or that it was possible to predict when the activity was likely to occur again. Thus, petitioner's assertion that the criminal activity was "ongoing" is an unwarranted inference. The criminal activity observed by the tenant-informant can most accurately be described as "occassional." Consequently, petitioner's analysis of this issue as our state courts' failure to apply the third party intervention doctrine in

an attempt to thwart the warrantless surveillance of "ongoing criminal activity" is spurious and should be recognized as such.

Indeed, the facts underlying the opinions in question reveal that Investigator Cassidy and the tenant-informant planned to meet in her basement two days after she initially told him what she had observed. Therefore, this is not a case in which a law enforcement official was invited by a private citizen to view "ongoing criminal activity" as it was occurring. At the time Cassidy set up surveillance of the basement, there was no basis to believe there was any "ongoing criminal activity." Cassidy might have observed a myriad of intensely private conduct. It was merely fortuitous that he observed the illegal activity which the informant had described to him two days before the search of respondents' residence.

As correctly observed by the dissenting judge in the state appellate court, what distinguishes the instant case from "third party intervention" cases in general is that, in other cases,

> [t]he breach of privacy by the private searches revealed objects, some of which were illegal. The government agents saw the same objects. Thus, the inspections by the government agents did not expand the scope of the product of the initial private searches.... In the present case, the police were not invited to view specific, immutable objects that the tenant-informant had reduced to possession. The police were invited to participate in the surveillance of a basement and any activities which might occur in that basement during the police surveillance. Because no one could predict with certainty what the police would see, unlike the Jacobsen line of cases, each moment of surveillance was a new invasion of privacy. The basement activities to be seen from the tenant-

> informant's vantage point could have included licit as well as illicit behavior, activities of other members of the suspect's family and even private intimate behavior.

App. B, p. 35a.

In the instant case, Investigator Cassidy's surveillance necessarily exceded the scope of the initial intrusion because he was not invited to view specific, immutable objects, nor was there any indication that the criminal activity would be "ongoing" when the surveillance was conducted. In fact, Cassidy testified that respondent Eddie Saez was not arrested immediately after the search of his basement on May 17, 1990, because Cassidy wanted to conduct additional surveillance of the Saez basement. To that end, Cassidy obtained a key to the informant's residence so he could come and go as he pleased, and returned to the basement approximately ten times after May 17, 1990. While Cassidy observed respondent Eddie Saez and his children at various times during these additional surveillances, he made no further observations of any illegal activity.

The conclusion reached in the opinion of the New Jersey Supreme Court which relies on the dissenting opinion of the state appellate court, is well supported by the facts. Respondents urge this Court to deny the petition for certiorari because the "third party intervention" exception to the warrant requirement is inapplicable and because no substantial question is presented by the petition.

CONCLUSION

For these reasons, it is respectfully urged that the Petition for a Writ of Certiorari be denied.

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